

Effectiveness of the One-Woman Board Member Mandate under the Companies Act 2013

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After various corporate frauds that hit India in the early stages of last decade like the Satyam Computers Scam, 2G Spectrum Scam, Vijay Malaya Scam to name a few the need for improved corporate governance for the personal reassurance for public good became a necessity. Simultaneously, The Companies Act, 1956 was undergoing a drastic change as the Companies Act (Amendment) Bill, 2012 was tabled in the Parliament, which eventually gave birth to the Companies Act, 2013. This Bill, apart from the various amendment that it proposed, also attempted to alter the customary Indian mentality that confined a woman's potential by suggesting the mandate of one women board member, if the concerned company has paid-up share capital of one hundred crore rupees or more; or turnover of three hundred crore rupees or more.¹ Through the initial part of this paper we understand that how the one woman on board quota came into being in India as a positive influential trend from myriad countries all over the globe. Following that we try to comprehend the extent of adaptation of the said rule in India given its socio-cultural angle which stands at a stark contrast with its European counterparts. Furthermore, after analyzing the current lacunas in the legislation we suggest various approaches which would be a good option for India to adopt making the one women board member rule more air-tight, effective, and ensure performance in congruence with its rationale.

INTRODUCTION

The Companies Act, 2013 (“Act”) is innovational in many ways, insisting on stronger governance, accountability, transparency, and management. In addition, there is an extremely enhanced role of the directors incorporated in the new Act and following the implementation of gender diversity quotas in several European nations and other corporate governance suggestions calling for increased board diversity in India, the one-woman director mandate was foreseeable. Otherwise, the one-woman director rule was proposed for the first time through the recommendations of the Naresh Chandra Committee in 2002. The initial bill had a clause that would have let the Ministry of Corporate Affairs (“MCA”) set a gender quota for the board, but it was removed after significant opposition and saw little discussion over the subsequent years.

A woman's strength in a corporate setting involves bringing in a new unique perspective, which may be missing with all men on board, fostering healthy relationships, high collaborative powers and multi-tasking.²

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¹ Section 149(1), *Companies Act, 2013*.

² Rani Sahoo, D., 2021. *View of Corporate Governance and Role of Women Directors under The Companies Act, 2013*. [online] Archives.palarch.nl. Available at: <<https://www.archives.palarch.nl/index.php/jae/article/view/8807/8205>> [Accessed 1 October 2022].

Perhaps these are the reasons for the need for inclusion of such talent on the board. The principle of board diversity and Gender Equality is enshrined in the said provision which seeks to ensure a healthy change. However, there arises a conflict in legislation intent and intentions of the corporations at large. Through this paper, we seek to analyze as to how this provision isn't complied in accordance with its purpose and suggest some ways to ensure better compliance.

TRACING THE GROWING NEED FOR WOMEN INCLUSION AND BOARD DIVERSITY AROUND THE WORLD

Patterns of male dominance that are built into the legal framework of corporate governance repeatedly replicate themselves to keep women out of executive offices and boardrooms but innate need for gender diversity in India emerged in response to similar demands made elsewhere in the world. The most honorable mention should be ascribed to Norway, which in 2003, around the same time as Chandra Committee made a recommendation became the first country to adopt a mandatory requirement for 40% board members to be women for approximate 500 private and state-owned companies, and along with that imposing strict penalty in non-compliance that is dissolution of the company.³ Though, this case be the spark which must have initiated the fire for the need of gender diversity in the boardroom, we can assume India was still not ready for such a drastic modification given the diminutive discussion on the same.

It was only after in the early years of the last decade that other countries around the world started legislating for promotion and increased representation of women in boardrooms like Spain recommended 40% seats for women on company boards in 2007 followed by UK's 30% Club Campaign asking to mandate 30% board seats to women in FTSE 100 companies.⁴ Later in 2011, France became the biggest nation to enact a law requiring a minimum of 40% female directors on company boards and in 2015 Germany introduced the 40% board quota for women.⁵ It was not that these countries initiated this positive steps towards gender diversity by simply looking at trends in other countries but there by actually referring to various empirical reports and evidences showcasing how various data conducted prove that women are actually capable of performing better in executive level positions and true contributions a woman can make, if made part of the decision-making process. For example: A study by the *Peterson Institute for International Economics*, which looked at data from 21,980 publicly traded companies in 91 countries, correlated 15% increase in profitability to the rise in the proportion of women from 0% to 30%.⁶ In a Harvard Business Review analysis, women outperform men on 17 of the 19 capabilities like that set exceptional leaders apart from average or subpar ones.⁷ A 2010 McKinsey Report reported that companies with top-quartile participation of women on executive committees outperformed those without women at the top, generating an average of 47% greater return on equity and 55% more earnings before interest and tax.⁸

Therefore, attributing to corporate governance reforms around the globe, India finally included the one women director quota, for limited companies under S.149(1), of the Act read with Rule 3 of The Companies (Appointment and Qualification of directors) Rules, 2014. Even in 2013, the legislation received severe backlash, the contention being that sole merit should be criteria

³ Afra Afsharipour, *The One-Woman Director Mandate: History and Trajectory*, Corporate Governance in India: Change and Continuity, Pages 85-105, November 2016, <https://doi.org/10.1093/acprof:oso/9780199469321.003.0005>

⁴ *ibid*

⁵ A Kamalnaath and Y Peddada, *Women in Boardrooms: Formulating A Legal Regime for Corporate India*, Journal on Governance, Vol. 1 No. 6, 2012

⁶ M Noland; T Moran and B Kotschwar, *Is Gender Diversity Profitable? Evidence from a Global Survey*, Peterson Institute for International Economics, February 2016, <https://www.piie.com/publications/working-papers/gender-diversity-profitable-evidence-global-survey>

⁷ J Zenger and J Folkman, *Women Score Higher Than Men in Most Leadership Skills*, Harvard Business Review, June 2019, <https://hbr.org/2019/06/research-women-score-higher-than-men-in-most-leadership-skills>

⁸ McKinsey & Company, *Women at the top of corporations: Making it happen*, October 2010, <https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/women-at-the-top-of-corporations-making-it-happen>

to get a seat at the table rather than reservation but various ministers like the then Corporate Affairs Minister, Sachin Pilot and Securities and Exchange Board of India (SEBI) fiercely protected the new law stating that it would broaden viewpoints while decision-making processes keeping away from comparability of disposition and assist companies with better comprehension and association with their partners.⁹ SEBI, in 2012, through its *Consultative Paper on Review of Corporate Governance Norms in India*, portrayed the requirement for more noteworthy board variety under the focal point of better direction, expressing that 'variety, in the entirety of its perspectives, fills a significant need for board viability'.¹⁰

LACUNAS AND CHALLENGES IN INDIAN CONTEXT

It is no new news that the rule mandating one woman director as per the Companies Act, 2013, on the face of it, appears to be a step towards achieving women's participation in the corporate world and equalizing the role of both sexes. But the riddle is not that simple. What the law aims to achieve is participation and to create a genuine platform for women to take part in decision-making in a company and present their stand and deliberation on the subject matter as opposed to just being a dormant or a sleeping seat on the table. However, the implication of the law is drastically different than what was presumed.

The stark difference between what the legislator envisaged and what ensued is due to a lot of reasons. One of the main reasons as propounded by scholars is the ***Critical Mass Theory***.

Today, almost all the companies in India have one woman director or a small minority of women on the board. The question arises, "Is it enough?" While most articles and journals talk about the presence of a woman on the board, critical mass theory talks about the number of women on the board.¹¹ It seeks to answer what number of women is necessary to have an impact on the firm's innovation. Further, it analyses whether one woman director or even two females have any impact or not. One or two female directors are referred to as tokens for this theory and three women are referred to as reaching the critical mass. Historically, there have been numerous experiments conducted to assess the influence that the majority exerts on the minority in a small group.¹² Since such sub-group is under-represented, their presence is referred to as tokenism and the majority as "dominants". It is inferred that stereotyping in such a situation presents an impediment for the tokens to exert any sort of influence on the working and decisions forming process. Tokens are often doubted and patronized by the dominant mass. Such a reaction is observed especially when tokens are women in a corporate setting. However, when the size of the tokens increases and reaches a critical mass, there occurs a qualitative change in board discussions and deliberations.

It is further suggested that for the purposes sought to be achieved by the Companies Act, 2013, generally, a critical mass of three women has to be achieved in board settings in a company.¹³ This is based on a study by Harvard Business School, whereby a group of students was asked to participate in a visual test.¹⁴ Teams were formed of 4 people. In a team, 3 people (confederates) were told to give the same wrong answer. The experiment was enacted to judge how the student (who was not part of the planning) react to the confederates' answers. It was observed that more than half the time, the real subjects gave the same wrong answers to the

⁹ A. Gupta, *Draft guidelines for corporate gender party soon: Sachin Pilot*; Business Standard, August 19th, 2013 https://www.business-standard.com/article/news-ians/draft-guidelines-for-corporate-gender-party-soon-sachin-pilot-113081900489_1.html

¹⁰ *Id n 2*

¹¹ Mariateresa Torchia, Andrea Calabrò and Morten Huse, *Women Directors on Corporate Boards: From Tokenism to Critical Mass*, Journal of Business Ethics, August 2011, Vol. 102, No. 2 (August 2011), pp. 299- 317

¹² <https://www.egonzehnder.com/global-board-diversity-tracker>

¹³ *Ibid.*

¹⁴ W. Kramer, V. and M. Konrad, A., 2006. *How Many Women Do Boards Need?* [online] Harvard Business Review. Available at: <<https://hbr.org/2006/12/how-many-women-do-boards-need>> [Accessed 29 September 2022].

obvious questions asked. This experiment further suggested that three usually present a critical mass, a tipping point from tokenism. Reaching the critical mass is essential to see any sort of shift in corporate boardroom dynamics. Therefore, mandating one woman, although a noble cause and a step with genuine intentions, is not enough.

Another shortcoming of the said provision was ***nepotism***. In many companies, for the sake of convenience and sparing the trouble to find a competent woman, the appointment of friends or a family member was seen as a quick fix. Rather than nurturing the existent talent within the company or tapping into the world for experienced and competent women, women (in the majority of cases) with no knowledge or conversance with corporate experience hold directorship positions in eminent companies. This is inconsistent with the goal of board diversity sought by the new Act to promulgate meaningful conversations and contributions to corporate processes. This was seen at Reliance Industries, when Nita Ambani was made their first woman director on the Board. Many companies followed suit, like Videocon Industries, JK Tyre, and Industries, Godfrey Phillips India, etc. followed suit, propagating a trend, and eroding the motive of the provision.¹⁵

As for the companies who failed to comply with the mandatory provision by the deadlines, it was contended on their behalf that they couldn't find a single qualified woman with suitable experience to fit the position and qualifications required for a such seat.¹⁶ Since no specific punishment is laid in violation of section 149(1) of the Act, section 172 and 450 had to be referred. This section provides that the company and every officer involved of the company who is in default shall be punishable with a fine not less than Rs. 50,000 which may extend up to Rs. 5,00,000. Further to curb the problem of appointing female relatives, SEBI brought amendments to Listing Obligations and Disclosure Requirements (LODR) Regulations making appointment of one Independent Director mandatory. In the year 2020, failure to comply with SEBI LODR Regulations would lead to suspension of trading of shares of listed entities. In the case of *Re v. Icomm Tele Ltd. and Ors*¹⁷., compounding of such offence at any stage was allowed by the NCLT which would give rest to lengthy and expensive proceedings. So, even in cases of non-compliances, several options were available with companies to get away with the requirement to fulfil it afterwards. Whereas a strict punishment as seen in the case of Norway would've been ideal.

Therefore, it can be concluded that although the Companies Act, 2013 had envisaged a healthy and welcome change keeping in mind the societal reforms and growing participation of women, the loopholes were easily spotted by corporations to which it applied. Even if a competent woman was appointed, the problem of tokenism will be apparent in a room crammed with men. It can be said that the provision has been unable to find the balance between the legal requirement of such appointment and complying with the characteristics and expectations of the Section to hire women of expertise, training, and skills as mentioned.

SUGGESTIONS

In October 2019, Ministry of Corporate Affairs (MCA) under Section 150(1) of the Act mandates an Online Proficiency Self-Assessment Test for new Independent Directors and existing position holders if they wished to continue with their position.¹⁸ This was seen as a step to test the existing independent directors as to their

¹⁵ Nimitha Aboobaker, Dr Manoj Edward, *Gender Diversity as a facilitator towards Human Capital Development in Boardrooms – the case of Corporate Governance law in India*, Researchgate 1, 3 (2016),

https://www.researchgate.net/publication/319065330_Gender_Diversity_as_a_facilitator_towards_Human_Capital_Development_in_Boardrooms-the_case_of_Corporate_Governance_law_in_India?enrichId=rgreq- last seen on 10/08/2020.

¹⁶ Dr Rajesh Kumar Agrawal, *A study on Appointment of Woman Directors by Companies in Mumbai*, 2 International Journal Of Ethics in Engineering and Management 1, 4 (2015),

¹⁷ *Re v. Icomm Tele Ltd. and Ors* (NCLT)-2016-8-28.

¹⁸ Independentdirectorsdatabank.in. 2022. *Self-Assessment: ID Platform*. [online] Available at: <https://www.independentdirectorsdatabank.in/self_assessment> [Accessed 2 October 2022].

knowledge and expertise and also to prevent appointment of trophy independent directors in a company just for the sake of complying with the legal requirements. This was in consonance of the rationale of having independent directors in the first place to ensure transparency and having a mechanism to keep a check and balance on the workings of the firms, especially in Indian context given the existence of Family business and appointment of Board of Directors through relatives and familial connections. This can be contrasted with the problem of appointment of mandatory women director in a company and appointment of trophy directors just to fulfil the legal provision. Mandating a test which requires knowledge of basic fundamental corporate concepts and working affairs of a company could perhaps to some extent increase the credibility of the appointed woman director and also ensure the company of their appointment meanwhile curbing the problem of hiring family women on the board.

Although it is suggested that certain exceptions can be made as in the case of Independent Director Test. For example, women with 10 or more years of experience on the board, Attorneys with experience, people who are Chartered Accountants, Company Secretaries etc. It should be assumed that such people have the requisite command over subject matters of corporate governance and skills to meaningfully contribute to the discussions and affairs of a company.

Additionally, the quota compliance ensures women to step into the room, to ensure their participation a long viable solution has to be developed to make the quota system viable in the long run. This could be done by investing in structures supporting women in workplace. Companies and Industry leaders should develop mentoring programs for women in leadership positions. This could be done in the form of in-house training or recruiting or inviting women from the industry in working space to join for self-development and growth. Not only corporations but various organizations and associations across the globe could take part in it. One such example is *The Australian Institute of Company Directors* (“AICD”), noteworthy programmes with the view “to enhance the connections of chairmen and experienced directors of ASX 200 listed companies with experiences and skilled women who may be suitable for director roles.”¹⁹ This actually led to a considerable increase in the number of women on boards in Australia that people attribute to this AICD programme.²⁰ In India, confederations of Indian industry could start similar programme with competitive entry process to gain essential repertoire and a platform to network too.

Furthermore, India is positioned 23rd internationally with respect to India's female board presence improved by 4.3 percentage points in 2014 to 15.2% in 2019 over the course of five years. This is much less than the 20.6% average for the world. India also ranks third lowest in the Asia Pacific for the percentage of female chief executive officers being 2%, and second lowest for the percentage of female chief financial officers being 1%.²¹ India has one-woman on-board mandate but, what is that the correct number of women board members? It has been recognized by experts that solo women on boards frequently feel segregated and minimized. When they are successful, it isn't because *they are the only women* but rather *despite that factor*. Although it doesn't always result in change and may have its own challenges, having a second woman on a board might assist to lessen the feeling of isolation but might be seen as a separate group.²² Hence, as per Critical Mass Theory the ideal number of women board directors to have, is at least three. But this might not work for a country like India where corporates and companies are looking for just *prima facie* compliance of this law.²³

¹⁹ Aicd.com.au. 2022. *About*. [online] Available at: <<https://www.aicd.com.au>> [Accessed 3 October 2022].

²⁰ Afra Afsharipour, *The One-Woman Director Mandate: History and Trajectory*, Corporate Governance in India: Change and Continuity, Pages 85-105, November 2016, <https://doi.org/10.1093/acprof:oso/9780199469321.003.0005>

²¹ Credit Suisse Research Institute, *The CS Gender 3000 in 2019: The changing face of companies*, October 2019, credit-suisse.com/researchinstitute

²² A Konrad & V Kramer, *How many Women do Boards need?* Harvard Business Review, December 2006, <https://hbr.org/2006/12/how-many-women-do-boards-need>

²³ V.W. Kramer, A.M. Konrad, S. Erkut, *Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance*, 2006, <https://www.wcwonline.org/vmfiles/CriticalMassExecSummary.pdf>

Therefore, one way that effective compliance of S.149(1) of the Act and increased representation of women board members can be made is through having a definite percentage quota instead of a definite whole number, like other countries. Since a company incorporated in India u/s 149(1)(b) of the Act can have maximum of 15 directors but by passing a special resolution this maximum limit can be further increased and the companies for which the parliament seemed to have mandated the one-woman on-board rule is with a paid-up share capital of one hundred crore rupees or more; or turnover of three hundred crore rupees or more. Few companies with more than 15 directors on board are Larsen & Toubro Ltd. (18 Directors), Jaiprakash Associates Ltd. (16 Directors), Dharampal Satyapal Ltd. (17 Directors).²⁴ Eventually, the whole number of at least one woman would fall in the gap and with increased board size the chances of increased women decision-makers, taking the trend into consideration, would be static. Hence, amending the whole number quota to a percentage value would ensure that the lacuna of having at least one or three women on the board could be curbed.

CONCLUSION

India is unique: on the one hand, it has female CEOs running some of its top banks, a fact that is uncommon even on Wall Street; on the other hand, it has appallingly low levels of female economic engagement.²⁵ More diversity in the workplace means tough questions get asked, reducing the risk of herd mentality, governance issues and leading to robust dialogue and creative thinking take centre stage setting the pathway for innovation and progress in a company. Studies have shown that women are better at research than men, they come to meetings after doing their homework and they don't shy away from tough questions or decisions.²⁶

In our paper, we have endeavored to grasp these contending real factors and have attempted to recognize the covert influences that have helped hindered women from holding leadership positions inside India companies. To address the underrepresentation of women, we have proposed a quota strategy, which is supplemented by mentoring initiatives designed to keep women's potential in the workforce. When women in junior roles see seniors break the glass ceiling in boardrooms, their morale improves. India has already advanced a step in the correct direction with mandating such a rule, but the current law has several lacunas, which has made it ineffective and redundant, and it is time that new amendments are made. Even the latest Companies Law (Amendment) Act, 2020 failed to address this issue, but when have women ever gotten anything easy?

²⁴ https://www.sesgovernance.com/pdf/1523435610_Part-A--Board-Composition-Report.pdf

²⁵ *Id n 2*

²⁶ *Id n 2*